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No. 88-1503

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN
Petitioners

vs.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents

vs.

THAD C. McCANSE, Guardian ad litem,
Respondent

On Writ of Certiorari to the Missouri Supreme Court

~~MOTION FOR LEAVE TO FILE~~
BRIEF OF AMICI CURIAE ELIZABETH SADOWSKI, PROF. JOSEPH WARGANZ AND THOMAS SYSESKEY IN SUPPORT OF RESPONDENTS

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October 12, 1989

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Amici move for leave to file this brief because they have not received written consents from 2 parties who have given verbal consents, and because one party, Thad McCanse, Esq has not replied to written and phone requests for consent to file a brief in

behalf of respondents. They have spoken and written against euthanasia for years. They believe the petition seeks to legalize euthanasia.

Their brief stresses points others have not, which they believe are decisive: The Fifth Amendment allows legalized deprivation of life only as punishment for crime; there can be no civil proceeding in which a person can be deprived of life through starvation or other means.

Amici also argue that it is a denial of equal protection and due process to protect the incompetent charged with or convicted of crime from proceedings which could lead to death and not to so protect the incompetent like Nancy Beth Cruzan who has committed no crime. Jackson v. Indiana, 406 U.S. 715,730,731 (1972).

Respectfully,

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On Writ of Certiorari to the
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BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

Elizabeth Sadowski is a cable television producer, writer and lecturer who has frequently appeared on radio and television

to debate euthanasia and life issues. She is State Director of New Jersey Majority Women, which opposes euthanasia. She resides at 39 Koenig Lane, Freehold, N.J.

Thomas Syseskey, of Holy Cross College, has done extensive research and speaking on the issue of euthanasia, opposing the practice. He resides at 25 Caiumet, in Worcester, Mass.

Professor Joseph Warganz, a PhD., is a full Professor of Philosophy. He has taught philosophy in Morris County New Jersey, for over 20 years. He has spoken and written on the ethical problems involved in euthanasia.

Amici oppose the petition in this case because it would legalize euthanasia.

Affiliations listed for identification only

SUMMARY OF ARGUMENT

No person can be deprived of life in the United States except if he or she has been convicted of certain serious criminal offenses. The Fifth and Fourteenth Amendments bar an intentional taking of human life where no crime has been committed.

A number of state courts, relying on an opinion of the American Medical Association, have approved denial of of nutrition through tubes to certain patients in permanent comas. This AMA opinion was arrived at and issued by only seven physicians, and apparently cannot be reversed. Other eminent groups have declared opposition to denial of nutrition to coma victims.

Incompetent persons who have committed or are charged with crimes which can be punished by the death

penalty are protected from the death penalty because they are incompetent. It denies equal protection of the laws to Nancy Beth Cruzan, an incompetent, if she also is not protected from intentionally inflicted death.

To allow Nancy Beth Cruzan to be starved to death because she is incompetent is to deprive her of life by a court created ex post facto law.

The United States treated euthanasia as a crime when it was committed by the Nazis. This precedent is now binding on the United States.

1. THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION PROHIBIT DEPRIVING A PERSON OF LIFE EXCEPT IN CRIMINAL CASES

The Fifth Amendment to the U.S. Constitution states that no person shall be deprived of life..."without due process of law." This prohibition is incorporated in the Fourteenth Amendment.

Amici contend that historically the Fifth Amendment's provisions prohibiting the taking of "life" without "due process" have limited the legalized killing of persons in in the United States to those persons convicted of serious crimes.The Fifth Amendment's precise language demonstrates this. Prior to the words "nor be deprived of life" are the words "in any criminal case."

Congress and the states and the courts are not free to expand this literal and traditional meaning of due process in the Fifth Amendment so as to deprive a person of life in a civil proceeding, and to thereby make any process "due process" by an exercise of their "mere will.' Murray's Lessee v. Hoboken Land and Improvement Co.59 U.S. 272,276 (1856), Trustees of Dartmouth College v. Woodward, 17 U.S. 518-582 (1819).

Thus, the Fifth Amendment, which is incorporated in its criminal interpretation in the Fourteenth Amendment, is not only a restraint on the legislatures, but on the executive and judicial powers as well. State court decisions allowing the deliberate taking of life by starvation are thus expressly contrary to

the Fifth Amendment, which limits the taking of life to criminal cases.

All persons, young or old, healthy or unhealthy, conscious or unconscious, have a constitutionally guaranteed right to life. Of the constitutionally guaranteed rights of which a person cannot be deprived under the Fifth and Fourteenth Amendments, it is evident that life is the most sacred. Liberty is a very precious right, but a deprivation of liberty, however reprehensible, is not inherently permanent. A person who is put to death by the State or by another person loses his life permanently.

The sacredness of a person's life evidenced by the Constitution's demand that no life can be taken deliberately

except as punishment for serious crimes is echoed in other charters apparently influenced by the Fifth Amendment as it has been interpreted over the years. The European Convention on Human Rights, is one of these.

The European Convention
On Human Rights

> Article 2. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.1

The European Convention on Human Rights was signed on November 4,1950. It has been ratified by 20 nations including the Continental European nations, the United Kingdom, Turkey, Iceland, Cyprus and Malta.

1. Ian Brownlie, Basic Documents On Human Rights, 243 (1981)

In this petition, the U.S. Supreme Court is implicitly being asked to forget the Fifth Amendment and Fourteenth Amendment traditional interpretation limiting legalized killings to those persons convicted of serious crimes. It is being asked for permission to take the life, by deliberate starvation, of a person who has committed no crime. It is being asked to permit legal killings through both the criminal law and civil law. It is being asked to legalize euthanasia. This case is the Roe v. Wade of euthanasia.

2. THE OPINION OF THE AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS ON WITHHOLDING FOOD AND WATER FROM PATIENTS IS THE OPINION OF SEVEN PHYSICIANS, AND CANNOT BE REVERSED

Much attention and weight has been given in this case to American Medical Medical Association Opinion 2.18 entitled "Withholding or Withdrawing Life-Prolonging Medical Treatment." This statement has been quoted and relied upon in cases similar to this case. Cf. In re Grant, 109 Wash. 2d. 545,747 P.2d 445,450 (1987) (en banc), modified in 757 P.2d 534 (1988);Rasmussen v. Fleming, 154 Ariz. 207,741 P.2d. 674,684 (1987); In re Gardner, 534 A. 2d 947,954 (Me. 1987); In re Peter, 108 N.J. 365,529 A. 2d. 419,427-28 (1987);Brophy v. New England Sinai Hopital, Inc. 398 Mass. 417,

497 N.E. 2d 626,638 (1986).

The opinion of the AMA Council is repeated in its entirety in the Appendix of the Amicus Curiae brief filed by the American Medical Associ- with the U.S. Supreme Court in May, 1989.[2] The Opinion states in part that it is ethical for doctors to withhold all means of life prolonging medical treatment from patients in irreversible comas. Nutrition and hydration is defined as treatment when artificially supplied. Thus, in layman's language, a person in an irreversible coma fed by tubes may ethically be starved or dehydrated.

While the AMA Council's opinion has been widely quoted and relied upon by courts, it is not widely known that

2. In Petitioner's Brief dated September 5,p.25,the Opinion number is 2.20 rather than 2.18.

only seven of the American Medical Association's physician membership of over 271,000 physician members were on the AMA Council which issued Opinion 2.18.[3]

What is even less widely known is that apparently once the 7 member AMA Council on Ethical and Judicial Affairs issues an opinion it cannot be reversed. According to a New York "Times" article dated March 16,1986 by Lawrence K. Altman:

> "...Under the association's bylaws, the judicial council's opinions cannot be overruled by the American Medical Association's House of Delegates or its officers, and can only be changed by the council itself, according to Toba Cohen, a spokesman for the Chicago based organization..."

The New York "Times " article quoted Dr. Nancy W. Dickey, chairman of the AMA Council as saying:

> "...the physician is under no

3. The New York "Times," 1,March 16 (1986).

> obligation" to stop therapy. The ruling "does not say that a physician has to pull out IV's or a feeding tube." The ruling states that doing so "is not unethical."[4]

Thus, the Opinion issued on March 15, 1986 appears to be the irreversible fiat of seven physicians on what is ethical in medical practice.

Other opinions have been expressed on this subject which are contrary to that of the 7 member AMA Council. On October 30, 1985, a recommendation was made on the subject of providing food and water to those in comas by the Pontifical Academy of Sciences. This Academy consists of 80 scientists from various disciplines ranging from Stephen Hawking, the British physicist, an agnostic, admitted in 1986, to scholar priest Leonard Boyle, O.P. Included are

4. The New York "Times," 1, March 16 (1986)

Nobel Prize winners from a number of nations including Australia, Great Britain, India, America, Pakistan, Italy, Sweden, and Japan. It advises the Pope on topics including fundamental science, bioethics, science and technology applied to world problems,science and development, and science for peace.[5]

The Pontifical Academy of Science, addressing the question of feeding the person in a permanent coma, said this:

> "If the patient is in permanent coma, irreversible as far as it is possible to predict, treatment is not required, but care, including feeding, must be provided."[6]

The Pontifical Academy, in this statement, distinguishes between "care" which includes feeding, however provided, and "treatment." It thus differs from the 7 physicians on the AMA Council

5. M. Ricci,"The Pope's Scientific Task Force," 30 Days,74-77, April (1989).
6.NC News Service, October 31 (1985).

who state that nutrition and hydration (food and water) which are"artificially" provided, that is provided through a tube or intravenously, are "treatment".[7]

The World Medical Association also has taken a position against the physician deliberately ending the life of a a patient. Meeting in Madrid, Spain for its annual meeting in October, 1987, the World Medical Association (WMA) adopted The Declaration of Madrid on euthanasia. In pertinent part that resolution states:

> "Euthanasia, that is the act of deliberately ending the life of a patient ,even at the patient's own request or at the request of close relatives, is unethical...." [8]

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7. In re Peter, 529 A. 2d 427-428 (1987).

8. World Medical Association, 28 Avenues des Alpes, F.01210,Ferney Voltaire, France, provided this text upon request.

The 7 member AMA Opinion 2.18 giving the physician the right to determine when "treatment" (which includes food and water supplied through a tube) may be ended for a patient in an irreversible coma, has drawn criticism from some legal scholars. One of these is Professor Yale Kamisar, professor of criminal law at Michigan.

Addressing the question of whether physicians should have the right to end lives by cutting off food and water, Professor Kamisar made this comment to a reporter for "Legal Times," in its May 2, 1988 issue:

> "Just because they (cops) knew how to fire the gun doesn't mean they should decide when to fire. Just because doctors know how to save lives doesn't mean they should decide when 'to save and when to let life go."[9]

9. D. Levy, "Euthanasia: The Lines Keep Shifting," Legal Times, 15, May 2, 1988.

In further comment in the same Legal Times article of May 2,1988, Professor Kamisar was asked to reply to comments by Nancy Cruzan's sister on the "Night-line" television program. The sister said Nancy would want the feeding tube removed because "She was a very (active) person, so vivacious, so indepedent." Professor Kamisar replied:

> "Is that all there is?
> Is that how one exercises
> the 'right to die?'"..."
> If you can't choose, you have
> no 'right to die!.."
>
> "Unless you're prepared to
> kill people directly,
> you shouldn't let them
> die. What's going on is
> the greatest self-decep-
> tion in recent history.." [10]

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10. D.Levy, "Euthanasia: The Lines Keep Shifting," Legal Times, 15, May 2,1988.

In an article entitled "Pope Gets Letter from Americans Concerned About Euthanasia," Religious News Service on July 24,1989 reported that over eighty five American university professors, physicians, lawyers, health care professionals and leaders of groups opposed to euthanasia had written to Pope John Paul II to express their concerns. The group was alarmed over the growing trend to "allow starvation and dehydration of patients who cannot feed themselves."

An appeal against starvation by this group appeared as an Open Letter to the Pope in the July 27,1989 issue of " The Wanderer," a national Catholic weekly. The coalition asked the Pope to publicly condemn the starvation of patients.

3. NANCY BETH CRUZAN IS DENIED EQUAL PROTECTION OF THE LAWS IF SHE IS DEPRIVED OF LIFE BECAUSE SHE IS INCOMPETENT WHILE OTHER INCOMPETENTS WHO HAVE COMMITTED CAPITAL CRIMES ARE PROTECTED FROM THE DEATH PENALTY BECAUSE OF THEIR STATUS AS INCOMPETENTS

It is undisputed that Nancy Beth Cruzan, who is in a coma, is incompetent. It is also undisputed that she is charged with no crime, and in particular, that she is charged with no capital crime.

If Nancy Beth Cruzan was incompetent, and she was charged with a capital crime, the trial against her could not proceed,[11] and she would not be at risk of being found guilty and facing the death penalty. Bishop v. United States, 350 U.S. 961, (1956). Solesbee v. Balkcom, 339 U.S. 20 (1950).

Nancy Beth Cruzan is denied equal protection of the laws under the Fourteenth

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11. Missouri Revised Statute § 552.030 relieves a person from responsibility for criminal conduct because of mental defect.

Amendment if her incompetency does not insulate her from intentionally inflicted death as it does the incompetent charged with a capital crime. Ex Parte Virginia, 100 U.S. 339 (1880),

It would be grossly unfair and outrageous to deprive an incompetent who has committed no crime of her life, while shielding an incompetent who has allegedly committed a capital crime, or been convicted of such a crime, from legalized killing by the state.

In the case of Jackson v. Indiana, 406 U.S.715,730 (1972), the court compared the committment procedure for a mentally defective person charged with crimes with civil committment procedures. The mental defective charged with crime, who had virtually no chance of gaining the state of mind necessary to face trial

faced a virtually indeterminate committment, which was tantamount to a life sentence. The person who committed no crime and was committed because of his mental condition faced only limited committment. Under the circumstances, the mental defective charged with crime was being denied equal protection of the law under the Fourteenth Amendment.

Jackson v. Indiana stands for the rule that persons suffering disabilities should be treated the same, whether charged with crime or not. If mental defective Jackson, charged with a crime, cannot be given a committment which is in effect a life sentence, and may be released from custody if his condition does not improve, then Nancy Beth Cruzan, who is disabled but has committed

no crime, should not be given a death sentence because she will not recover from her disability. Jackson v.Indiana 406 U.S. 715, 730,731 (1972). Caritativo v. California, 357 U.S. 549 (1958).

4. TO ALLOW NANCY BETH CRUZAN TO BE STARVED BECAUSE SHE IS INCOMPETENT IS TO DEPRIVE HER OF LIFE BY A COURT CREATED EX POST FACTO LAW

When Nancy Beth Cruzan went into a coma, there was no statute which stated that being in a permanent coma was a "crime" for which society could impose death. To intentionally impose death on Nancy Beth Cruzan because she has fallen into a coma which seems permanent, is to impose a criminal penalty, death, for an act, falling into a permanent coma, or being in a permanent coma, which was not punishable by death when the act occurred.

The case of Calder v. Bull, 3 U.S. 386, 393 (1798)held that the prohibition of ex post facto laws in the Constitution applied only to penal and criminal statutes. It has been held, however, that the constitutional prohibition may not be

evaded by giving a civil form to a measure which is essentially criminal. Burgess v. Salmon, 97 U.S. 381 (1878).

Any state law authorizing intentional starvation of persons in comas, persons who are senile, and persons having other forms of illness not only violate due process and equal protection provisions of the Constitution, but are also violative of the prohibition of ex post facto laws. Such laws evade the prohibition of ex post facto laws by giving a civil form to a measure which is essentially criminal. Burgess v. Salmon, 97 U.S. 381 (1878).

The Courts should not transgress the spirit of the stricture against ex post facto laws by rulings which deprive persons of life on grounds (i.e. being in in a permanent coma) which were not

established as a basis for deprivation of life at the time the individual developed the condition.

In Nazi Germany, when patients having various illnesses were subjected to euthanasia, a secret decree issued by Adolf Hitler in October,1939 backdated to September 1, 1939 gave Dr. Karl Brandt and Reich leader Bouler "responsibility for expanding the authority of physicians,to be designated by name, to the end that patients considered incurable according to the best available judgment of their state of health can be granted a mercy death.." (quoted in R.Lifton,"The Nazi Doctors,"p.63,1986).

The German public did not know of this decree. There were many protests not only against the euthanasia program, but

against the fact that the public did not know of the existence of any law which enabled the Nazi state to kill certain persons who had various mental or physical disabilities. An example was the protest of the supervisor of the sanatorium for mental patients and epileptics at Stettin. He wrote on September 6,1940 to the Reich Minister of Justice to protest the killings:

> "...If the State really wants to carry out the extermination of these patients or certain kinds of mental diseases, should not a clear law-openly accounted for to the people-be published, a law which would give every single person the guarantee of his liability to die or right to live.." (quoted in W.Harris,"Tyranny on Trial," p.324 (1954).

5. THE UNITED STATES TREATED EUTHANASIA AS A CRIME WHEN IT WAS COMMITTED BY THE NAZIS. THIS PRECEDENT IS NOW BINDING ON THE UNITED STATES

After World War II, the United States, in joint tribunals with its Allies, and in U.S. Tribunals, charged and convicted various Nazis as to Crimes Against Humanity and War Crimes. Euthanasia was treated as both a crime against humanity and a war crime. These precedents are now binding on the United States. Cf. W. Harris, "The Precedent of Nuremberg" 537-568, Tyranny on Trial (1954);Trials of War Criminals Before Nuernberg Tribunals,Vol. II,198 October 1946-1949). Trials of Major War Criminals, Vol. I, 247,301 (1947).

CONCLUSION

The judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted.

ROBERT L. MAURO
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October 12, 1989